187

(5)

Supreme Court, U.S.
FILED
APR 29 2011
OFFICE OF THE CLERK

No. 10-315

IN THE

Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

RICHARD A. HARPOOTLIAN
RICHARD A. HARPOOTLIAN, PA
PO Box 1090
Columbia, SC 29202

GEDNEY M. HOWE, III
GEDNEY M. HOWE, III, PA
PO Box 1034
Charleston, SC 29402

A. CAMDEN LEWIS
Counsel of Record
LEWIS & BABCOCK, LLP
PO Box 11208
Columbia, SC 2921
(803) 771-8000
acl@lewisbabcock.com

MICHAEL E. SPEARS
MICHAEL SPEARS, PA
PO Box 5806
Spartanburg, SC 29304

April 29, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Petitioner, in its Supplemental Brief, argues that the decision in *AT&T Mobility, LLC v. Concepcion*, No. 09-893, is indistinguishable from this case, and that the lower court's rejection of Petitioner's pre-emption argument cannot be reconciled with *AT&T* case. The issue in AT&T was whether the Federal Arbitration Act (FAA) preempted "California's ***rule*** classifying most collective-arbitration waivers in consumer contracts as unconscionable." *AT&T*, p. 5 (emphasis added). The California rule was a judicially created rule set forth in *Discover Bank v. Superior Court*, 36 Cal 4th 148, 113 P.3d 1100 (2005).

In *AT&T*, the majority did not go so far as to preempt a State's statutorily-mandated, substantive right, which is the issue in this case. The South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief." The South Carolina Supreme Court held that the Legislature had specifically recognized the need for consumer protection with regard to automobile dealers:

> The purpose of the Dealers Act is consumer protection....Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (2010), reh'g denied (June 9, 2010). The Court continued:

> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a **non-waivable right** to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (emphasis added). The *AT&T* case only involved a judicial rule stating that generally, class action waivers were unconscionable. This case involves a substantive right allowing a person to "sue for the benefit of the whole" as expressly provided by a South Carolina statute. Is it the Supreme Court's opinion that the FAA can preempt a consumer's

substantive right conferred by a South Carolina state statute?

A state's statutory laws become part of, and are incorporated in, every contract. See, e.g., *Barnitz v. Beverly*, 163 U.S. 118, 127, 16 S. Ct. 1042, 1045, 41 L. Ed. 93 (1896) (stating that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it). Here, there are perceived conflicting provisions: a right under the Dealers' Act, S.C. Code Anno. § 56-15-110, which provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief" and a prohibition against class actions in the arbitration agreement. The South Carolina Supreme Court specifically found that the right to a group or class action was "a non-waivable right" under the Dealers Act. *Herron v. Century BMW,* 387 S.C. 525, 536, 693 S.E.2d 394, 400. The *AT&T* decision cannot be said to have eradicated the protection of a statutory, non-waivable right that is not limited solely to arbitration, but applies to any proceeding involving the Dealers Act.

Also, as Justice Thomas noted in a separate opinion in the *AT&T* case, if there is a defect in the formation of the arbitration agreement, the agreement is not enforceable. The conflict between the South Carolina statute and the arbitration provision creates a defect in the formation of the agreement because the agreement attempts to force a waiver of a non-waivable right.

Furthermore, there is no justiciable case or controversy in this matter because the Petitioner is in full default in the case below. An entry of default has been entered, and while Petitioner has moved to set

aside the entry of default, no relief has been granted. As the defaulting party, Petitioner has admitted all allegations of the complaint and conceded liability, and there is no justiciable case or controversy to provide Petitioner standing to petition for A Writ of Certiorari.

Therefore, Respondents submit that the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A. HARPOOTLIAN
RICHARD A. HARPOOTLIAN, PA
PO Box 1090
Columbia, SC 29202

GEDNEY M. HOWE, III
GEDNEY M. HOWE, III, PA
PO Box 1034
Charleston, SC 29402

A. CAMDEN LEWIS
Counsel of Record
LEWIS & BABCOCK, LLP
PO Box 11208
Columbia, SC 2921
(803) 771-8000
acl@lewisbabcock.com

MICHAEL E. SPEARS
MICHAEL SPEARS, PA
PO Box 5806
Spartanburg, SC 29304

April 29, 2011